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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 481 F.2d 1018 (P. 58a-71a).[1] The opinion of the National Labor Relations Board is reported at 195 NLRB 197 (P. 1a-58a).

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[1] The letter "P." refers to the petition for a writ of certiorari; the letter "A." refers to the single appendix before this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1973 (P. 72a). On October 5, 1973, Mr. Chief Justice Warren E. Burger entered an order extending the time within which to file a petition for a writ of certiorari to December 17, 1973. The petition for a writ of certiorari, filed on November 12, 1973, was granted on April 29, 1974 (A. 200). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Act protects an employee and her fellow-employees who are her union representatives from discharge or other discipline by their employer where (1) the employer discharges the employee because she declines to submit to questioning by her employer which she reasonably believes may lead to disciplinary action against her unless she is accompanied by and has the assistance of her union representative at the interview, and (2) the employer suspends one union representative, and suspends and later discharges another union representative, because they seek to furnish the representation asked of them by their fellow-employee.

STATUTE INVOLVED

Section 7 of the National Labor Relations Act (29 U.S.C. § 151) accords employees *inter alia* "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce em-

ployees in the exercise of the rights guaranteed in section 7"; section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in . . . employment to encourage or discourage membership in any labor organization . . ."; and section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ."

STATEMENT

I. The Findings

The findings of the National Labor Relations Board, affirmed by the Court of Appeals, may be summarized as follows:

Quality Manufacturing Company (the Company) is engaged in the manufacture of women's clothing at Point Pleasant, West Virginia (P. 2a, 19a; A.3, 8). Its owners and principal officers are Lawrence Gerlach, Sr., president; Mary Kathryn Gerlach, his wife and production manager; and Lawrence Gerlach, Jr., their son and general manager (P. 2a, 59a; A. 4, 8, 17, 68-69). The Union since 1968 has been the certified collective bargaining representative of the Company's production and maintenance employees (P. 20a, 59a; A. 4-5, 8). The agreement between the Company and the Union provides that "[t]here shall be a Shop Chairlady . . . selected by or under the auspices of the Union" (A. 189). In 1969 Delila Mulford was the Shop Chairlady (P. 23a, 59a; A. 24, 34, 45, 61-62, 185); Martha Cochran was Assistant Shop Chairlady and Secretary-Treasurer of the Union (P. 20a, 60a; A. 24, 33-34, 184-185); and Catherine King was a long-time employee of the Company (P. 2a, 59a; A. 70).

On October 16, 1969, the Company discharged Catherine King because she had refused to attend a conference at the Company's request without union representation in circumstances where she "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (P. 4a, 7a, 24a). On October 12, 1969, the Company had suspended shop chairlady Delila Mulford for two days, and on October 16, 1969, the Company discharged her, for her persistence "in seeking to represent King at the conference . . . [which the Company] requested" (P. 3a, 4a, 8a, 23a-24a). On October 14, 1969, the Company had suspended assistant shop chairlady Martha Cochran for two days for the same reason (P. 3a-4a, 8a, 21a). On October 16, 1969, the Company discharged Martha Cochran for "filing grievances on behalf of herself, Mulford, and King" (P. 4a, 9a, 22a).

The events which culminated in the suspensions and discharges began on the morning of Friday, October 10, 1969. On that morning shop chairlady Delila Mulford, employee Catherine King, and two other employees met with all three Gerlachs. At the meeting the employees complained that they could not make a satisfactory wage under the piece work system then in effect. The discussion ended with Gerlach, Jr., ordering Mulford to return to her work station and telling her "if [the employees] didn't like the way it was there in the company to go elsewhere." (P. 2a, 23a, 59a; A. 46, 53, 57-58, 73, 78.)

Later the same day, while on the production floor, Mrs. Gerlach noticed that King had shut down her machine, and was waving her arms and gesturing, causing some minor disturbance. Two other employees

had stopped their machines and were watching King. Mrs. Gerlach directed King to resume production, but King told her to "tend to your business." Thereupon Mrs. Gerlach ordered King to go to Mr. Gerlach's office. King did, but on her way to the office she asked shop chairlady Mulford to accompany her. Mrs. Gerlach warned Mulford that she "had no business down there," but Mulford left her work station and accompanied King to the anteroom of Mr. Gerlach's office. Mrs. Gerlach informed her husband of what had transpired. Mr. Gerlach told Mulford to return to her work station because "it wasn't a grievance and [they] didn't have any business with her." Mulford refused, replying that "Catherine paid her dues and she was entitled to [have me] be there," to which the Gerlachs rejoined that Mulford "was endangering . . . [her] job . . ." Mr. Gerlach ordered King to come into his office for a discussion but King replied that she would not without Mulford. Gerlach then told both King and Mulford to return to their work stations. They did. On Sunday, October 12, Mrs. Gerlach at her husband's request telephoned Mulford and informed her that she was suspended for two days. She gave no reason, but Mulford understood that it was because of her conduct in seeking to represent King on the previous Friday, as it was. (P. 2a-3a, 23a-24a, 59a-60a; A. 46-48, 55-56, 73-74, 75, 79-80, 82-83, 92, 126-127, 134, 137-138, 165, 173.)

The following Monday, October 13, King found upon reporting for work that her time card was not in the rack, indicating under plant practice that she was wanted in Mr. Gerlach's office. This time King asked Martha Cochran, the assistant shop chairlady, to accompany and represent her. Cochran went with

King without first "punching in" on her own time card. They met Mrs. Gerlach outside the office. She warned Cochran that "your time card is upstairs and my advice to you is to go upstairs and go to work if you want your job." She added that the Gerlachs wanted to talk only to King and "take up where we left off Friday." Cochran replied, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is union business and she has asked me to represent her," stating further that she was a union steward and that was her duty. Cochran and King then spoke to Mr. Gerlach and asked him if he was going to give King her time card. He said that he would not until King came into his office and talked to him in private. Cochran and King declined to accede to the request for an interview with King without union representation. They sat and waited in or near the office for the remainder of the day. In the meantime Cochran's card was also "pulled" from the rack. (P. 2a-3a, 20a-21a, 60a-61a; A. 25-27, 127-128, 167.)

The next morning, Tuesday, October 14, Cochran and King again went to Gerlach's office. They asked him if he was going to return King's time card. Gerlach again replied that he would not until King talked to him in private. Cochran asked about her own card. She was informed that she had been suspended for two days for being away from her work station the day before. King and Cochran left the plant. (P. 3a-4a, 21a, 61a; A. 28, 168.)

The next day, Wednesday, October 15, Mulford's two-day suspension ended. She went to Gerlach's office together with Cochran and King. They were met by the Gerlachs. Mulford inquired as to the status of Cochran and King. Mr. Gerlach replied that Cochran

was still under suspension for another day and that he would not give King her time card until she came into the office and talked to him in private. Cochran and King left. Mulford went to work. (P. 4a, 24a, 61a; A. 28-29, 48-51, 169.)

The following day, Thursday, October 16, Cochran's two-day suspension expired. She, Mulford and King went to the office and were again met by the Gerlachs. Mrs. Gerlach gave Cochran her time card and she went to work. Mrs. Gerlach then told King that Mr. Gerlach wanted to see her in the office alone. King asked, "With Delila [Mulford]?" Mr. Gerlach responded. He said, "No, not with Delila." He added that if King "went out the door"—that is, again declined to participate in a private interview—"she was finished." King walked out. Mulford then asked if she could go to work. Gerlach replied, "No. You've abandoned your job. You're finished." (P. 4a, 24a, 61a; A. 15, 29-30, 38, 51, 131, 170.)

During the noon hour of the same day, October 16, Cochran went to the office of Gerlach, Jr., and sought to present written grievances to him on behalf of Mulford, King, and herself. Gerlach, Jr., told her that he did not have time "to fool with them damn things. . . . I'm leaving town." Cochran laid the grievances on his desk but Gerlach picked them up and threw them in the trash. He then walked into the work area, pulled Cochran's time card, and told her, "you worked this morning, but you're not working this afternoon." Cochran went to the office of Gerlach, Sr., and asked if she had been fired. He responded, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant. Later that day Cochran telephoned Gerlach's secretary and asked

whether Gerlach wanted her to report for work the next day. The secretary told her, "He said no." Cochran asked the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran was never notified to come back to work. (P. 4a, 22a, 61a-62a; A. 31-33, 59, 67-68, 135.)

II. The Board's Conclusions and Order

The Board's conclusions divide into three related parts.

1. The Board found that on October 16, 1969, the Company discharged Catherine King because she had refused to attend an interview at its request without union representation in circumstances where she "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (P. 4a, 7a). This finding confronted the Board with the need to address the question of whether or not statutory protection is available in "a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview" in which the risk of discipline to the to-be-interviewed employee reasonably existed (P. 5a). The Board concluded that in such a situation "it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action" (P. 6a). The Board explained that the employer was free to forego the interview if he was unwilling to conduct the interview with the union representative present, but that the employer was not free to coerce the employee's unrepresented attendance. The Board

stated the rationale in support of its conclusion as follows (P. 6a-7a);

> This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.
>
> This seems to us to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses.

The Board limited the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee has "reasonable grounds to fear" that the outcome of the interview may adversely affect his employment status (P. 6a and n. 3). This qualification meshes the employee's lack of need for protection where cause for apprehension does not reasonably exist with the employer's interest in operational flexibility. As the Board stated, "We would not apply the rule to such run-of-the mill shop-floor conversations as, for example, the giving of instructions or training or needed

corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative" (P. 7a). The Board later explicitly confined the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee requests representation.[2] Finally, the Board adhered to its settled position distinguishing between an investigatory interview and a disciplinary interview. The Board found that the requested interview in this case was investigatory, and pointed out that, (1) as here, at an investigatory interview of an employee, which is fact-gathering in purpose, the employer has the option not to meet with the union repressentative so long as he chooses to forego the interview, while (2) at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative (P. 5a).[3]

Accordingly, one member dissenting, the Board concluded that "King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct. Under these circumstances King reasonably requested union representation. It is also clear that . . . [the Company]

[2] *Mobil Oil Corporation*, 196 NLRB 1052, n. 2 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973).

[3] The Trial Examiner found that the proposed interview with King was disciplinary in purpose (P. 38a, 45a), but the Board acted on the premise that the interview was investigatory (P. 5a-6a).

discharged King for insisting on this right. Therefore, we conclude that King's discharge was in violation of Section 8(a)(1)" (P. 7a-8a).

2. The Board found that the Company suspended shop chairlady Delila Mulford and assistant shop chairlady Martha Cochran "for performing their duties as union chairladies in seeking to represent King . . .", and later discharged Mulford for "insisting on representing King" (P. 8a). Accordingly, one member dissenting, the Board concluded that, as the conduct constituted "protected concerted activity," the suspensions and discharge "violated Section 8(a)(1) of the Act" (P. 8a-9a).

3. The Board unanimously concluded that the Company "discharged Cochran because she sought to engage in a protected concerted union activity, filing grievances on behalf of herself, Mulford, and King. Thus her discharge was in violation of Section 8(a)(3) and (1) of the Act" (P. 9a).

The order entered by the Board precisely encases its conclusions. As to coerced participation of an employee in an interview without union representation, the Board ordered the Company to refrain from (P. 9a-10a):

> Disciplining any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.
>
> * * *
>
> Requiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representa-

> tion has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

As to the efforts of the union representatives to furnish their fellow-employee with the representation asked of them, the Board ordered the Company to refrain from (P. 10a):

> Discriminating against union chairladies seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation.

As to the presentation of a grievance by a union representative, the Board ordered the Company to refrain from (P. 10a):

> Discriminating against union chairladies for seeking to file grievances.

Finally, the Board ordered the Company to offer reinstatement to King, Mulford and Cochran, and to make them whole for any loss of earnings sustained by them because of their suspensions and discharges (P. 55a).

III. The Decision of the Court of Appeals

The Court of Appeals enforced that part of the Board's order pertaining to the discharge of Cochran for "filing grievances on behalf of herself, Mulford, and King" (P. 62a). But it denied enforcement of the remainder of the order on the ground that "King had no right to have a union representative present at

the requested meetings with her employer . . ." (P. 62a). It based its conclusion virtually wholly on its reading of precedent (P. 63a-70a). In its view, while there is "no doubt that employees have a right to union representation after a grievance has been filed," the "issue here is whether that right may be extended under the Act to require employers to permit an employee to have union representation at interviews . . . whenever the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation" (P. 68a, n. 1). According to the Court of Appeals prohibition of coerced attendance at such an interview rests on a "new theory as to the meaning and application of the Act, and the extent of employees' rights thereunder," and implicates the Board in an impermissible assertion of "power to alter or rearrange employer-employee relations to suit its every whim" (P. 70a).

On July 17, 1973, two days before the decision of the Court of Appeals in this case, the Court of Appeals for the Seventh Circuit reached a like conclusion upon the same question.[4] In its view, while the right to bargain for and to exert economic pressure to secure union representation at an investigatory interview by contract "is plainly guaranteed by § 7 of the Act" (482 F.2d at 845), the statute does not by its own force confer the right to union representation, for the "requested Union representation at an investigatory interview is clearly not the kind of 'concerted activity' with which § 7 is primarily concerned" (*id.* at 847). Why it is not is unexplained. The court simply relied on its perception of "precedent" and its unparticularized version of

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[4] *Mobil Corporation* v. *N.L.R.B.*, 482 F.2d 842 (C.A. 7, 1973).

"history" (*id.* at 847-848). It was moved to its conclusion by apparent reluctance to embrace what it believed to be a "novel . . . interpretation" which, as it saw it, "would have been recognized many years ago" were it valid (*ibid.*).

On October 9, 1973, the Court of Appeals for the Fifth Circuit joined the Fourth and Seventh Circuits in rejecting the Board's conclusion. *N.L.R.B.* v. *J. Weingarten,* 485 F.2d 1135 (C.A. 5, 1973). Like the other courts of appeals, it rested its view on its perception of precedent (*id.* at 1137-38), opining without analysis "that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (*id.* at 1138). On April 29, 1974, this Court granted certiorari to review the judgments in this case and *Weingarten* and set the two "for oral argument in tandem" (A. 200).

SUMMARY OF ARGUMENT

I

The question this case presents is whether the National Labor Relations Act protects an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. Entry into the question is facilitated by a common premise. All grant that at or after the imposition of discipline the employee is statutorily entitled to union representation to contest it. The question then is whether the employee is entitled to

union representation in the predecisional stage when the employer seeks to subject him to a compulsory interview preparatory to its determination of whether or not the employee merits discipline.

The employee's need for the protection of union representation is at least as exigent in the investigation of his conduct by inquiry of him before the decision is made as it is thereafter. For fright, inexperience, or ignorance may expose him to unmerited discipline which would be avoidable had he had the aid of knowledgeable union representation at his interview. And the employer himself might well reach a different decision if his own inquiry of the employee were informed by the competent contribution of the union representative. Furthermore, the purpose of an interview is not confined to confirming or establishing the existence or absence of blameworthy conduct. Questions in extenuation of the offense and of the appropriate extent of discipline also require exploration.

Accordingly, what happens at the interview is always significant, and often decisive, in determining whether or not discipline is merited and in assessing the appropriate degree of punishment. To require postponement of union representation until after the decision is reached is therefore to deny it at the critical predecisional stage which may for all practical purposes be conclusive of the outcome.

Compelling the employee's subjection to such an interview without the assistance of union representation cannot be squared with the National Labor Relations Act. For the employee is required to confront his employer alone and unaided when the entirety of the statute is premised on eliminating just such individual

helplessness. Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism . . . ."[5] To require an employee to submit to an interview which may lead to his discipline without the aid of union representation is therefore to perpetuate the very inequality which the Act denounces and to bar protected recourse to the very means which the Act safeguards as the way to overcome that inequality. Accordingly, as the Board holds, "Such a dilution of the employee's right to act collectively to protect his job interests is . . . unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action."[6]

II

Recognition that an employee has a statutory right to refuse to submit without union representation to an interview in which the risk of discipline reasonably inheres harmonizes with actual industrial practice. "An essential part of any investigation is to give the employee affected full opportunity to explain his actions."[7] But a full opportunity is significantly less than full if the employee is without the aid of union representation. Accordingly, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation is such that the employee who is called in for interrogation has

[5] S. Rep. No. 573, 74th Cong., 1st Sess., 3 (1935).

[6] *Mobil Oil Corp.*, 196 NLRB 1052 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973).

[7] Slichter, Healy & Livernash, The Impact of Collective Bargaining on Management, 646 (1960).

reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him."[8] The participation of the union representative in the interview does not convert it into an adversary contest but rather enhances its usefulness by increasing the likelihood of securing more accurate information and a more informed interchange of views to the advantage of all. In general, therefore, the accepted view is that "an employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him."[9]

III

There is no merit in the bases asserted to resist the existence of a statutory right in the employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.

1. Protection of the employee from unrepresented attendance at an interview of him depends upon his having "reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action" (P. 9a). It is said that this standard is objectionable because "only the employee's subjective state of mind will presumably be examined, and the violation will turn not on any objective considerations but on the subjective state of mind of the employee" (P. 12a-13a). It is enough to respond, as the

[8] *Chevron Chemical Co.*, 60 LA 1066, 1071 (M.H. Merrill, 1973).

[9] *Universal Oil Products Co.*, 60 LA 832, 834 (B. M. Shieber, 1973).

Board does, that " '[r]easonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case" (P. 6a, n. 3). It is a contradiction in terms to assert that " 'reasonable ground' must be treated as a purely subjective matter" (*ibid.*).

2. It is said that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the Act but can be secured only by contract for which the employees have a statutory right to bargain and strike (*supra*, p. 13). Confinement of protection to contract rests on *ipse dixit* alone. Union representation is in its essence concerted activity for mutual aid or protection; safeguarding the worker's refusal to confront his employer in an adverse situation without union representation is at the heart of the Act; and statutory protection in this situation harmonizes with actual industrial practice. The protection which the statute confers is of course often supplemented and refined by contract, but the statutory character of the right is not altered because of its contractual duplication or reenforcement.

3. It is said that precedent belies the existence of the statutory right (*supra*, pp. 13-14). But such precedent as is in point is unpersuasive; much that is asserted as precedent is simply misunderstood; and the ossifying role which is assigned to precedent is fundamentally mistaken. The Board has simply drawn from the statutory imperative " 'to give laborers opportunity to deal on equality with their employer' "[10] the modest re-

[10] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 183 (1941), quoting from *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921).

quirement that an employee shall be free from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. The Board has thus performed its essential function of "translating into concreteness" (*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 193 (1941)) "the dominant purpose of the legislation" (*Republic Aviation Co.* v. *N.L.R.B.*, 324 U.S. 793, 798 (1945)). This is the very reason for the Board's creation, and nothing in precedent bars it from the full discharge of the role for which it was commissioned.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS ACT PROTECTS AN EMPLOYEE FROM COMPULSORY ATTENDANCE WITHOUT UNION REPRESENTATION AT AN INTERVIEW WHICH HE REASONABLY BELIEVES MAY RESULT IN HIS SUBJECTION TO DISCIPLINE.

The question this case presents is whether the National Labor Relations Act protects an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. Entry into the question is facilitated by a common premise. All grant that at or after the imposition of discipline the employee is statutorily entitled to union representation to contest it. The question then is whether the employee is entitled to union representation in the predecisional stage when the employer seeks to subject him to a compulsory interview preparatory to its determination of whether or not the employee merits discipline.

The employee's need for the protection of union representation is at least as exigent in the investigation of his conduct by inquiry of him before the decision is made as it is thereafter. For fright, inexperience, or

ignorance may expose him to unmerited discipline which would be avoidable had he had the aid of knowledgeable union representation at his interview. And the employer himself might well reach a different decision if his own inquiry of the employee were informed by the competent contribution of the union representative. Furthermore, the purpose of an interview is not confined to confirming or establishing the existence or absence of blameworthy conduct. Questions in extenuation of the offense and of the appropriate extent of discipline also require exploration.

Accordingly, what happens at the interview is always significant, and often decisive, in determining whether or not discipline is merited and in assessing the appropriate degree of punishment. To require postponement of union representation until after the decision is reached is therefore to deny it at the critical predecisional stage which may for all practical purposes be conclusive of the outcome.

Compelling the employee's subjection to such an interview without the assistance of union representation cannot be squared with the National Labor Relations Act. For the employee is required to confront his employer alone and unaided when the entirety of the statute is premised on eliminating just such individual helplessness. Thus, the mischief which the Act identifies is the "inequality of bargaining power between employees . . . and employers . . ." (§ 1, 2d ¶); the end it seeks is "restoring equality of bargaining power between employers and employees" (§ 1, 3d ¶); and the means by which that goal is to be realized is through "protecting the exercise by workers of full freedom of association . . . and designation of representatives of their own choosing . . . for the purpose of . . . mutual aid

or protection . . ." (§ 1, 5th ¶). The Act thus rests on the old insight that "[a] single employee was helpless in dealing with an employer", and that "[u]nion was essential to give laborers opportunity to deal on equality with their employer."[11] Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism . . . ."[12]

To require an employee to submit to an interview which may lead to his discipline without the aid of union representation is therefore to perpetuate the very inequality which the Act denounces and to bar protected recourse to the very means which the Act safeguards as the way to overcome that inequality. Accordingly, the Board perceptively reached to the heart of the Act in rejecting that basic contradiction (*Mobil Oil Corp.*, 196 NLRB 1052 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973)):

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilu-

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[11] *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921).

[12] S. Rep. No. 573, 74th Cong., 1st Sess., 3 (1935).

> tion of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

Inhospitality to this view simply reflects an attitude unattuned to the basic reach of this statute. Statutory solicitude for the employee easily embraces protecting him in his refusal to submit without union representation to an investigatory interview of his conduct in which the risk of discipline reasonably inheres. And the extent to which a contrary conclusion is alien to the Act is exemplified by the decisions cited by the Seventh Circuit to support the applicability in this case of the view that an activity may "not in fact [be] protected" though within the "literal reading of § 7 . . ." (482 F.2d at 846. For we are asked to look for guidance to such unprotected activity as mutiny (*Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31 (1942)), participation in a violent sitdown strike (*N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)), engagement in a breach-of-contract strike (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1932)), and disparagement of the employer's product in circumstances akin to physical sabotage (*N.L.R.B.* v. *Local No. 1229, I.B.E.W.*, 346 U.S. 464 (1953)) (482 F.2d at 846, n. 11). It is a measure of the infelicity of the understanding of this statute that these decisions should be invoked when the question at issue is whether an employer can coerce an employee's subjection to an interview without union representation in circumstances where the employee reasonably fears that he is exposed to the infliction of discipline. Given that the Act has as "a primary purpose . . . to redress the perceived imbalance of economic power between labor

and management" (*American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316 (1965)), safeguarding the employee from unrepresented confrontation with his employer in this situation is within the natural protective ambit of the statute " 'read in the light of the mischief to be corrected and the end to be attained' " (*N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 124 (1944)).

II. AN EMPLOYEE'S STATUTORY RIGHT TO REFUSE TO SUBMIT WITHOUT UNION REPRESENTATION TO AN INTERVIEW IN WHICH THE RISK OF DISCIPLINE REASONABLY INHERES HARMONIZES WITH ACTUAL INDUSTRIAL PRACTICE.

Recognition that an employee has a statutory right to refuse to submit without union representation to an interview in which the risk of discipline reasonably inheres harmonizes with actual industrial practice. "An essential part of any investigation is to give the employee affected full opportunity to explain his actions." [13] But a full opportunity is significantly less than full if the employee is without the aid of union representation. Accordingly, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation is such that the employee who is called in for interrogation has reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him." [14] The participation of the union representative in the interview does not convert it into an adversary contest but rather enhances its usefulness by increasing the likeli-

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[13] Slichter, Healy & Livernash, The Impact of Collective Bargaining on Management, 646 (1960).

[14] *Chevron Chemical Co.*, 60 LA 1066, 1071 (M.H. Merrill, 1973).

hood of securing more accurate information and a more informed interchange of views to the advantage of all (*Independent Lock Co.*, 30 LA 744, 746 (J. W. Murphy, 1958)):

> [Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising.... [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to the problem.[15]

[15] See also, *Caterpillar Tractor Co.*, 44 LA 647, 651 (H. J. Dworkin, probably 1965):

> The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion.

Therefore, in general, the accepted view is that "an employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him."[16]

Practice and the natural reach of the statute thus mesh, and the convergence convincingly confirms the rightness of the Board's interpretation.

III. THE BASES ASSERTED TO DENY THE EXISTENCE OF A STATUTORY RIGHT TO REFUSE TO SUBMIT WITHOUT UNION REPRESENTATION TO AN INTERVIEW IN WHICH THE RISK OF DISCIPLINE REASONABLY INHERES ARE WITHOUT MERIT.

We turn now to consider the bases asserted to resist the existence of a statutory right in the employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.

A. The Claim Based on the Asserted Invalidity of the "Reasonable Grounds" Standard.

Protection of the employee from unrepresented attendance at an interview of him depends upon his having "reasonable grounds to believe that the matters to

[16] *Universal Oil Products Co.*, 60 LA 832, 834 (B. M. Shieber, 1973). See also, *Allied Paper Co.*, 53 LA 226 (J. F. Holly, 1969); *Pick-N-Pay Supermarkets*, 52 LA 832 (R. W. Haughton, 1969); *Thrifty Drug Stores Co.*, 50 LA 1253, 1262 (C. A. Jones, 1968); *Waste King Universal Products Co.*, 46 LA 283, 286 (J. D. Petree, 1966); *Dallas Morning News*, 40 LA 619, 623-624 (M. H. Rohman, 1963); *The Arcrods Co.*, 39 LA 784, 788-789 (E. R. Teple, 1962); *Valley Iron Works*, 33 LA 769, 771 (A. Anderson, 1960); *Schlitz Brewing Co.*, 33 LA 57, 60 (F. Meyers, 1959); *Singer Mfg. Co.*, 28 LA 570 (S. L. Cahn, 1957); *Braniff Airways*, 27 LA 892 (J. S. Williams, 1957); *John Lucas & Co.*, 19 LA 344, 346-347 (T. J. Reynolds, 1952).

be discussed may result in his being the subject of disciplinary action" (P. 9a). It is said that this standard is objectionable because "only the employee's subjective state of mind will presumably be examined, and the violation will turn not on any objective considerations but on the subjective state of mind of the employee" (P. 12a-13a). It is enough to respond, as the Board does, that " '[r]easonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case" (P. 6a, n. 3). It is a contradiction in terms to assert that " 'reasonable ground' must be treated as a purely subjective matter" (*ibid.*). Reasonableness as a standard runs throughout the law and examples could be endlessly multiplied. Thus, under the terms of the National Labor Relations Act itself, an employer is not relieved of responsibility for discrimination against an employee "if he *has reasonable grounds for believing*" that certain facts exist (§ 8(a)(3)(A) and (B)), and preliminary injunctive relief against certain conduct must be sought if "the officer or regional attorney to whom the matter may be referred *has reasonable cause to believe* such charge is true and that a complaint should issue . . ." (§ 10(1), emphasis supplied). The "reasonable grounds to believe" standard adopted by the Board in this case is thus an unexceptionable criterion readily within the mainstream of the law.

B. The Claim Based on Assertion That the Right May Be Secured by Contract But Does Not Exist by Statute.

It is said that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the Act but can be secured only by contract for which

the employees have a statutory right to bargain and strike (*supra*, p. 13). Confinement of protection to contract rests on *ipse dixit* alone. Union representation is in its essence concerted activity for mutual aid or protection; safeguarding the worker's refusal to confront his employer in an adverse situation without union representation is at the heart of the Act; and statutory protection in this situation harmonizes with actual industrial practice. The protection which the statute confers is of course often supplemented and refined by contract.[17] The substance of the statutory right may be enhanced by particularized contractual definition of its scope; realization of the statutory right may be furthered by contractual specification of the procedural means for asserting it; and incorporation of the statutory right into the contract performs the important function of eliminating debate as to its existence by the people on the factory floor who know their contract if not the law. Accordingly, the contract may facilitate vindication of the right, but it is the statute which creates it. Thus, discrimination because of union membership or nonmembership is prohibited by 40 percent of contracts,[18] but it can hardly be suggested that the right which the contract protects is therefore not statutory.[19]

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[17] Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 66-80 (1957).

[18] Basic Patterns in Union Contracts, 95:2 (BNA, February 1971).

[19] See *Alexander* v. *Gardner-Denver Co.*, 42 U.S.L.W. 4214, 4218 (S. Ct., Feb. 19, 1974); *Arnold* v. *Carpenters District Council of Jacksonville*, 42 U.S.L.W. 4754 (S. Ct., May 20, 1974).

C. The Claim Based on Precedent

It is said that precedent belies the existence of the statutory right (*supra*, pp. 13-14). But such precedent as is in point is unpersuasive; much that is asserted as precedent is simply misunderstood; and the ossifying role which is assigned to precedent is fundamentally mistaken.

1. Three decisions may be read as precedent adverse to the proposition that the Act protects an employee from coerced attendance without union representation at an interview with his employer which he reasonably fears may expose him to the risk of discipline. One is an obscure and cryptic 1947 decision of a court of appeals reversing a 1945 Board determination which is itself unclear and equivocal.[20] The other two are 1964 summary affirmances by the Board of trial examiners' decisions which are conclusory and unreasoned.[21] The search for the right reading of a statute should not atrophy with the first judicial rejection of an administrative determination, nor with unexplained agency affirmances of two trial examiners' decisions.

2. The second line of precedent, said to be contrary to the Board's interpretation, is simply misunderstood and is not adverse at all. The Board's settled position, adhered to in this case, distinguishes between an investigatory interview and a disciplinary interview: (*i*) as here, the Board found that the requested interview was investigatory, and at such a fact-gathering and exploratory interview the employer has the option not to meet

[20] *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607, 611-614 (C.A. 7, 1947), setting aside, 63 NLRB 1012, 1033-34 (1945).

[21] *Dobbs Houses*, 145 NLRB 1565, 1570 (1964); *Electric Motors and Specialties*, 149 NLRB 1432, 1440 (1964).

with the union representative so long as he chooses to forego the interview with the employee; (*ii*) in contrast, at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative.[22]

[22] *Cf., Texaco, Inc.*, 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969), in which the Board found that collective bargaining was obligatory because the interview of the employee was designed to support a disciplinary decision against him already made, *with Jacobe-Pearson Ford*, 172 NLRB 594 (1968), in which the Board found that collective bargaining was not required because the interview of the employee was "essentially for the gathering of information" (*id.* at 595). The Court of Appeals for the Fifth Circuit denied enforcement of the Board's order in *Texaco*, not because it disapproved of the requirement of collective bargaining at a disciplinary interview, but because in its view the "evidence is overwhelming that the interview was investigatory in nature. . . ." *Texaco Inc.* v. *N.L.R.B.*, 408 F.2d 142, 144 (C.A. 5, 1969). It therefore held that, "since the interview dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory collective bargaining." 408 F.2d at 145.

In its post-*Texaco* decisions the Board has been uniformly of the view that collective bargaining is obligatory at a disciplinary interview. *National Can Corp.*, 200 NLRB No. 156, 82 LRRM 1096 (1972); see also the decision of the trial examiner in *United Aircraft Corp.*, 179 NLRB 935, 968-969 (1968), in which the merits of this question were not reached by the Board, 179 NLRB at 937-938 (1969), or the Court of Appeals, 440 F.2d 85, 88, 97-98 (C.A. 2, 1971).

In contrast, collective bargaining has not been required by the Board at an investigatory interview, but in no post-*Texaco* case until the present one has the Board been confronted with action by an employer seeking to coerce an employee's unrepresented attendance at an investigatory interview. See, in addition to the post-*Texaco* cases previously cited in this note, *Lafayette Radio Electronics*, 194 NLRB 491 (1971); *Illinois Bell Tel. Co.*, 192 NLRB 834 (1971); *Texaco Inc.*, 179 NLRB 976 (1969); *Wald Mfg. Co.*, 176 NLRB 839, 846 (1969), affirmed on proceedings not presenting

It is this distinction which is misinterpreted. It is argued that, since the employer's statutory obligation to meet with the union representative is confined to a disciplinary interview of the employee, it necessarily follows that the employer can coerce the unrepresented attendance of an employee at an investigatory interview of him. But the logic of this argument is quite obviously fallacious. That the statute does not compel the employer to meet with the union representative does not mean that the statute allows the employer to compel the employee's submission to an interview without the

this question, 426 F.2d 1328 (C.A. 6, 1970); *Dayton Typographic Service*, 176 NLRB 357 (1969); *Chevron Oil Co.*, 168 NLRB 574 (1967).

Post-*Texaco*, beginning with this case, the distinctive question which has emerged is whether, although collective bargaining at an investigatory interview is not required, the employer can nevertheless compel the employee's unrepresented attendance, and the Board has held that the employee is statutorily safeguarded from such compulsion. *Quality Mfg. Co.*, 195 NLRB 197 (1972), enforcement denied, 481 F.2d 1018 (C.A. 4, 1973), cert. granted, April 29, 1974 (A. 200); *Mobil Oil Corp.*, 196 NLRB 1052 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973); *J. Weingarten, Inc.*, 202 NLRB No. 69, 82 LRRM 1559 (1973), enforcement denied, 485 F.2d 1135 (C.A. 5, 1973), cert. granted, April 29, 1974 (A. 200); *New York Telephone Co.*, 203 NLRB No. 46, 84 LRRM 1041 (1973). The crux of the offense is coercion of an employee's unrepresented attendance at an investigatory interview; the employer commits no violation where it terminates "the interviews without further ado when the employees involved refuse . . . to answer any questions without a union representative present." *Western Electric Co.*, 205 NLRB No. 46, 84 LRRM 1041, 1042 (1973).

Finally, the result in one case turned on Chairman Miller's swing view, which he alone has had occasion to express, that an employee's freedom from unrepresented attendance at an investigatory interview may be waived by the agreement of the union and employer. *Western Electric Co.*, 198 NLRB No. 82, 80 LRRM 1705, 1707 (1972). No question of waiver is before this Court in either this case or *Weingarten*. See, *N.L.R.B.* v. *The Magnavox Co.*, 42 U.S.L.W. 4300 (S. Ct., 1974).

union representative. Rather, each has equivalent freedom, the employer the liberty not to meet with the union representative, and the employee the liberty not to meet without the union representative. For example, an employer may not discharge his unorganized employees who walk off the job in a body because he has ignored their complaint about the lack of heat in the plant. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). Yet, since those same workers do not have a statutory bargaining representative, the employer is under no obligation to meet and confer about the cold in the plant.

In short, an employer is not free to coerce his employees in their exercise of a right protected by section 7 simply because the employer is not under an additional statutory obligation to bargain. It is this simple and basic distinction that the Board has perceived but the courts miss. As the Board has stated, "while the employer's denial of . . . a request [by an employee to be represented by his union] may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence" (P. 6a).

But were it true that the inexorable consequence of an employer's option not to meet with the union at an investigatory interview is to free the employer to coerce the employee's unrepresented attendance at that interview, the inquiry would not end. For the resulting inequity—conjoining effacement of the union at the

employer's will with the employee's subjection at the employer's command to unrepresented confrontation—would then compel examination of the validity of the premise that the employer has no statutory obligation to meet with the union at an investigatory interview of the employee. The object of the interview is acquisition of information as to the employee's conduct. At stake based on the information secured is the discharge, discipline, or exoneration of the employee. An employee's subjection to discharge or discipline is unquestionably a mandatory bargaining matter.[23] The information on which that decision is based is equally the subject of mandatory disclosure to the union as the indispensable adjunct of informed discussion.[24] Accordingly, since collective bargaining and divulgence of the information are obligatory after-the-fact of decision, the question reduces to why the union should not as of right at the employee's request be a party to the development of the information at the interview of the employee in advance of decision. Clearly, it should be. Inquiry of the employee is designed to elicit information from him on which his job security is dependent. The union as the chosen representative is the employee's natural protector in this process. Its mandatory participation is easily within the definition of obligatory collective bargaining defined by section 8(d) of the National Labor Relations Act: "the performance of the mutual obligation of the employer and the representative of the em-

[23] *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 360 (1940); *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247, 252 (C.A. 7, 1948), cert. denied on this point, 336 U.S. 960 (1949).

[24] *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Curtiss-Wright Corp.* v. *N.L.R.B.*, 347 F.2d 61, 68-69 (C.A. 3, 1965).

ployees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." Exposure of an employee to discharge or discipline is surely within the scope of "terms and conditions of employment," and an investigatory interview of that employee to adduce facts pertaining to his exposure is surely an appropriate occasion for the union's discharge of its representational role and the employer's "performance" of its reciprocal "obligation . . . to meet . . . and confer" with the union. To meet and confer at the investigatory interview, in a common fact-gathering effort in advance of decision and therefore unhampered by hardened positions, is the stage of the process which is the natural place to begin fulfillment of the mutual obligation of the union and the employer to treat with each other on the subject.

In sum, the employer's argument fails on two grounds. First, it is fallacious to argue from the premise that the statute does not compel the employer to meet with the union representative to the conclusion that the statute therefore allows the employer to compel the employee's submission to an interview without the union representative. Second, the premise of the argument is in any event unsound, for the statute does obligate the employer to meet with the union at an investigatory interview.

3. The role of precedent has in any event been fundamentally misconceived. Adjudication within the common law tradition is often tentative at the beginning, with some backing and filling as the scope of the problem is better appreciated under the impress of continuing exposure to different manifestations of it, and with the formulation of a definitive position necessarily

deferred until the ripeness of time has revealed in full dimension the considerations pertinent to the solution. This is especially true of the administrative process when it works well. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953) "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rationale response, not a quick definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . , and has modified and reformed its standards on the basis of accumulating experience." *I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961). To freeze development in the name of precedent contradicts the genius of the process. " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' " *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 255 (1970) (Stewart, J., concurring).

This evolutional approach is especially fitting here considering both the nature of this statute in its present application and the particular problem it addresses in this case. "As a charter of freedom," the National Labor Relations Act, like the Sherman Antitrust Act, "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." [25] More specifically, "[l]egislation, both statutory and

[25] *Appalachian Coals* v. *United States*, 288 U.S. 344, 359-360 (1933).

constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." [26]

As presently pertinent, the principle at the heart of the National Labor Relations Act is elimination of the helplessness of the individual worker by according to him the opportunity to attain equality through collective representation (*supra*, pp. 20-23). This principle has direct applicability to the question this case poses. The administration of discipline to control on-the-job misconduct is a pervasive part of life in the industrial community.[27] For the worker discharge because of a claimed infraction "is 'economic capital punishment'—the maximum penalty the employer may assess against the employee." [28] It is not alone the loss of his job that the employee suffers; termination strips him of his seniority, and concomitantly divests him of such benefits as pension rights, promotional preference, and layoff protection normally dependent on length of service. Discipline short of discharge is simply less severe pun-

[26] *Weems* v. *United States*, 217 U.S. 349, 373 (1910), quoted in *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247, 254 (C.A. 7, 1948), cert. denied on this point, 336 U.S. 960 (1949), to support an expanding reading of the subjects within the scope of mandatory bargaining.

[27] *E.g.*, O. W. Phelps, Discipline and Discharge in the Unionized Firm (1959); L. Stessin, Employee Discipline (1960); F. Elkouri and E. A. Elkouri, How Arbitration Works, 610-666 (3d ed., 1973); D. L. Jones, *The Supervisor and the Disciplinary Process in a Unionized Setting*, 26 Personnel Administration 42 (1963).

[28] O. W. Phelps, *supra*, n. 27, at 28.

ishment which is different in the degree of injury but not in the quality of the worker's concern with it. For the employer discipline is necessary to the maintenance of order and responsible conduct essential to production. For both the employer and the worker substantive and procedural fairness in the administration of discipline is indispensable. For the worker the need for protection against unjust punishment is self-evident. For the employer the need to refrain from unjust punishment is hardly less self-evident, for there is nothing more likely to wrack the industrial community to the detriment of the employer's self-interest in production and profitability than disciplinary unfairness.

Within this complex of basic and compatible interests the Board has drawn from the statutory imperative " 'to give laborers opportunity to deal on equality with their employer' " [29] the modest requirement that an employee shall be free from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. The Board has thus performed its essential function of "translating into concreteness" (*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 193 (1941)) "the dominant purpose of the legislation" (*Republic Aviation Co.* v. *N.L.R.B.*, 324 U.S. 793, 798 (1945)). It has fashioned a specific to reach an evil within the range of mischief at which the statute is aimed. It has reached a fair and reasoned judgment upon a question within its competence and its answer is therefore entitled to stand. *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-236 (1963).

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[29] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 183 (1941), quoting from *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921).

CONCLUSION

When all is said and done, the stark fact remains that an employer has discharged an employee, and suspended and discharged her fellow-employees who are her union representatives, for no cause other than insistence on union representation. Protection from this raw exercise of economic power to squelch the mutual aid which is at the heart of union representation is within the plain unsophisticated reach of the National Labor Relations Act. "In our increasingly dependent society, in the context of an employment situation in which collective action is the norm, it seems to be an anomaly to see the individual not merely standing alone, but being forced to stand alone on matters intimately related to his or her economic existence." [30] Accordingly, insofar as it denies enforcement of the Board's order, the judgment should be reversed and the cause remanded to the Court of Appeals with directions to enforce the Board's order in full.

Respectfully submitted,

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[30] D. W. Brodie, *Union Representation and the Disciplinary Interview*, 15 Bost. Col. Ind. Comm. L. Rev. 1, 49 (1973).